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IN THE

Supreme Court of the United States

October Term, 1962

No. 895

WILLIAM FISHER,

Petitioner,

vs.

THE CITY OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Statement

The petitioner seeks to have this Court review by writ of certiorari a judgment of the United States Court of Appeals for the Second Circuit, entered January 24, 1963 (Pet. Appendix, p. 26), which affirmed a judgment entered on September 20, 1962, in the United States District Court, Southern District of New York, pursuant to a decision of Judge Bonsal, granting the defendant's motion to dismiss the complaint and dismissing the complaint for lack of jurisdiction.

The opinion of the Court of Appeals has not yet been reported. It will be found in Petitioner's Appendix, pp. 24-25. The opinion of the District Court is reported in 208 F. Supp. 681.

The complaint purported to allege a cause of action against the City of New York under 28 U.S.C., 1343, for an illegal deprivation of plaintiff's rights in violation of the Fourteenth Amendment to the Constitution of the United States. The District Court held that such an action could not be maintained against a municipal corporation and dismissed the complaint, citing *Monroe v. Pape*, 365 U. S. 167 (1961), and *Egan v. City of Aurora*, 365 U. S. 514 (1961).

The Court of Appeals unanimously affirmed with a brief opinion citing the same cases as the District Court and *Spampinato v. City of New York*, 311 F. 2d 439 (2d Cir., 1962) [petition for certiorari *sub judice* in this Court (Misc. #857)]. We discuss the opinion of the Court of Appeals in greater detail hereafter, *infra*, pp. 9-10.

The Complaint

The complaint is set forth at pages 8a to 11a of the appendix in Court of Appeals filed herein.

The complaint alleges that plaintiff is a citizen (par. First); and that the present action is based upon 28 U. S. C., 1343, by virtue of plaintiff's deprivation of liberty without due process of law in violation of Section 1 of the 14th Amendment (par. Second).

The complaint then alleges that in 1933 plaintiff was convicted of the crime of manslaughter, first degree, in the Court of General Sessions, New York County, and was sentenced to a term of not less than 15 nor more than 30 years in a State prison and was thereafter imprisoned until October 1944, when he was released on parole. Thereafter plaintiff moved in the Court of General Sessions to vacate his conviction; the motion was denied, but the denial was reversed by the New York Court of Appeals, and the matter remanded for a hearing. After a hearing, the judgment of conviction was reversed upon the ground that plaintiff had been improperly convicted because of deprivation at his trial of his constitutional right of due process of law. Subsequently, the plaintiff was arraigned and on December 24, 1958, the indictment against him was dismissed (pars. Third-Fifth).

The plaintiff then filed a claim against the State of New York in the New York Court of Claims. That claim was dismissed and the dismissal affirmed by the New York Court of Appeals for the reason as plaintiff alleges "that plaintiff's alleged claim should be made against the City, not the State of New York" (par. Sixth). [As to actual decision, see *Fisher v. State of New York*, 23 Misc 2d 935, aff'd 13 A D 2d 608, aff'd 10 N Y 2d 69, 176 N. E. 2d 72. The Court of Appeals and the Appellate Division did not indicate that the plaintiff had a cause of action against the City of New York. The Court of Claims went no further than to suggest that "claimant should consider the liability of the City of New York for the acts of officers of the five counties (including New York County) comprising said city" (23 Misc 2d, at p. 936)].

Section 50-e of the New York General Municipal Law provides that a claim of the aforesaid nature against the City of New York shall be filed within 90 days from the date of accrual of such claim. Such 90 day period expired on March 24, 1959, prior to the dismissal of plaintiff's claim against the State in the Court of Claims (pars. Seventh, Eighth).

Thereafter an Act was passed by the State Legislature authorizing the Supreme Court of New York State to hear and determine plaintiff's claim against the City of New York. However, such Act was vetoed by the Governor on April 24, 1962 (pars. Ninth, Tenth).

The plaintiff alleges that he has instituted this action in the only court now available for that purpose and seeks damages resulting from his invalid conviction (par. Twelfth).

ARGUMENT

The City of New York is not subject to liability under the Civil Rights Act. The complaint was properly dismissed.

(1)

The complaint herein expressly alleges (par. Second) that the action is brought pursuant to 28 U. S. C., 1343. That section confers jurisdiction upon the Federal courts in respect to actions arising under the Civil Rights Act (42 U. S. C., 1983 *et seq.*). Section 1983 provides as follows:

"Every person, who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any

> citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." *

This Court has explicitly held that the provisions of the Civil Rights Act, including 1983, do not render a municipal corporation liable for an alleged violation of the statute. *Monroe v. Pape*, 365 U. S. 167 (1961); *Egan v. City of Aurora*, 365 U. S. 514 (1961).

Monroe v. Pape, *supra*, was an action instituted against the City of Chicago and various police officers of that city pursuant to 42 U. S. C., 1983, for an alleged deprivation of plaintiff's civil rights. Federal jurisdiction was asserted under that section and 28 U. S. C., 1343, as in the instant case. The complaint was dismissed by the District Court, and the Court of Appeals affirmed the dismissal. The Supreme Court held that the dismissal of the complaint against the City of Chicago was properly granted but reversed the dismissal as to the individual defendants. While there was a dissent by Justice Frankfurter as to the plaintiff's right to hold liable the individual police officers, the Court was unanimous in upholding the dismissal against the City of Chicago. The majority opinion discussed at length the legislative history of the Civil Rights Act and then stated (365 U. S. at pp. 191-192):

> "The response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by the Act of April 20, 1871, was so antagonistic that we cannot believe that the word 'person' was used in this par-

ticular Act to include them. Accordingly we hold that the motion to dismiss the complaint against the City of Chicago was properly granted."

Egan v. *City of Aurora*, *supra*, was an action under the Civil Rights Act, 42 U. S. C., §§1983 and 1985. In upholding the dismissal of the complaint against the City of Aurora, the Court said (365 U. S. at p. 514):

"The dismissal as to the City of Aurora was correct, for we held in *Monroe* v. *Pape*, *supra*, that a municipality was not a 'person' within the meaning of 42 U. S. C. §1983."

On March 18, 1963, this Court denied certiorari to the plaintiff in *Wise* v. *City of Chicago*, 308 F. 2d 364 (7th Cir., 1962), in which damages were sought by the administratrix of one Arthur Wise on the ground that he had suffered deprivation of his civil rights at the hands of the City of Chicago, its Corporation Counsel, and an Assistant Corporation Counsel in a criminal prosecution. It will be noted that in that case the Court of Appeals quoted with approval (at p. 366) from *Stitt* v. *Lynch*, 267 F. 2d 237 (7th Cir., 1959), where Chief Judge Duffy, speaking for the Court, said that "prosecuting officials are not to be amerced by actions under the Federal Civil Rights Act for their actions in connection with official prosecutions even though it is alleged that such acts were done maliciously." So, even on the assumption (which we believe to be untenable) that the Assistant District Attorney in the case at bar was acting on behalf of the City of New York (rather than the State of New York) in prosecuting the plaintiff in a State court for violation of a State criminal statute, there would seem to be no basis for a claim of violation of constitutional rights warranting review by this Court.

In the Court of Appeals the plaintiff's brief (p. 6) stated that the plaintiff's claim was "based upon 28 U. S. C. 1343 (3), which is derived from 42 U. S. C., Sec. 1983" and sought to distinguish *Monroe* v. *Pape*, *supra*.

Counsel representing the petitioner (not the counsel who appeared on his behalf in the Court of Appeals) now contends that his client's cause of action is not based on 42 U. S. C. 1983 but is grounded on 28 U. S. C. 1343 (3), which, it is asserted (Petition, p. 9), confers jurisdiction upon the federal courts to entertain suits for damages separate and apart from suits to recover under the Civil Rights Act.

The petitioner's contention is without merit. It is premised (see Petition, p. 9) on the untenable assumption that not until the year 1875 were federal courts given "original jurisdiction of civil suits arising directly under the Federal Constitution." Reference is made in the petition (*ibid.*) to the opinions of Justices Roberts and Stone in *Hague* v. *C. I. O.*, 307 U. S. 496 (1939), in support of this statement.

A reading of the opinions in the cited cases shows that they do not support the petitioner's position. Mr. Justice Roberts dealt (at p. 508) with 24 (14) of the Judicial Code, 28 U. S. C. 41 (14), which, as quoted by the Court (*ibid.*), is practically identical with present 28 U. S. C. 1343 (3). In a footnote (p. 508, fn. 10), the Court states that "The section is derived from R. S. 563, 12, which, in turn, originated in 3 of the Civil Rights Act of April 9,

1866, 14 Stat. 27, as reënacted by § 18 of the Civil Rights Act of May 31, 1870, 16 Stat. 144, and referred to in § 1 of the Civil Rights Act of April 20, 1871, 17 Stat. 13."

It thus appears that 28 U. S. C. § 1343 (3) or, more properly, the statute from which it derives, was part and parcel of the initial Civil Rights Act of 1866 and that its purpose, then as now, was to define the jurisdiction of the federal courts with respect to suits under that Act. This view is bolstered by the observation of Mr. Justice Frankfurter, dissenting on points not here relevant, in *Monroe* v. *Pape*, 365 U. S. 167 (1961), that (p. 213, fn. 18), "The jurisdictional provisions may now be found in 28 U. S. C. § 1343."

Judge Bonsal in dismissing the instant complaint in the District Court (Appendix in Court of Appeals, filed herein, p. 19a; also 208 F. Supp. 681, 682), noted that "The plaintiff's action is based on 28 U.S.C. § 1343(3), which section provides the jurisdictional basis for claims under 42 U.S.C. § 1983 (R.S. 1979)." So, too, the writer of the note in 66 Harv. L. Rev. 1285 (1953), referred to by Judge Bonsal (Appendix in Court of Appeals, filed herein, p. 19a) says (at p. 1293) of § 1343(3) that it "has traditionally provided the sole jurisdictional basis for claims under [Title 8] Section 43 [see now Title 42, § § 1981-1983]."

Since, then, 28 U.S.C. § 1343(3) does no more than confer jurisdiction upon the federal courts to entertain suits arising out of alleged violation of the Civil Rights Act, it follows that the holding of this Court in *Monroe* v. *Pape*, *supra*, 365 U. S. 167 (1961), that a municipality is not a

"person" within the meaning of that Act is decisive here and precludes a recovery of damages by the petitioner against the City.

The petitioner seeks (Petition, pp. 11-12) to derive some advantage from the statement in the opinion of the Court of Appeals (Appendix to Petition, p. 25) that "the sole basis of plaintiff's claim is based, not on the Civil Rights Act, but directly upon Section 1 of the Fourteenth Amendment to the United States Constitution." We affirm on the ground that plaintiff has not stated a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See Bell* v. *Hood*, [supra], 327 U. S. 678 (1946)]; *Shaffer* v. *Jordan*, 9 Cir., 1954, 213 F. 2d 393, 396-97."

The Court of Appeals put its holding in this form because the District Court had "dismissed for lack of jurisdiction" (Appendix in Court of Appeals, filed herein, p. 20a), whereas the Court of Appeals was of the view that, while the Court had jurisdiction of the subject matter, the complaint should nevertheless be dismissed for failure to state a cause of action. This is apparent from the reference in its opinion (Petition, p. 25) to *Shaffer* v. *Jordan*, 213 F. 2d 393 (9th Cir., 1954) where (pp. 396-397) the Court concluded "that the complaint failed to state a claim upon which relief could be granted; that the District Court nevertheless had jurisdiction over the subject matter of the action [citing in a footnote *Bell* v. *Hood*, *supra*]; and that, therefore, instead of being dismissed for lack of jurisdiction, the action should have been dismissed for failure of the complaint to state a claim upon which relief could be granted."

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CONCLUSION

The petition for certiorari should be denied.

March 27, 1963

Respectfully submitted.

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